IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5365 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHARATKUMAR V VYAS - Petitioner(s)
Versus
GUJARAT TRIBAL DEVLOPMENT CORPORATION & 1 - Respondent(s)

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Appearance :

MR PP MAJMUDAR for Petitioner(s) : 1,
Mrs. Sangeeta Pahwa for M/S THAKKAR ASSOC. for Respondent(s) : 1,
MR MM JADEJA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 01/02/2007

ORAL JUDGMENT

By way of this petition under Article 226 of the Constitution of India, the petitioner has

prayed for an appropriate writ, order or direction quashing and setting aside the seniority list at Annexure 'O' dated 18.7.1996 by which the petitioner is shown junior to the respondent No.2 considering the date of joining in the department to be the criteria for fixation of seniority. It is further prayed for an appropriate order directing the respondent No.1 Corporation to readjust the seniority list of Senior Assistant and place the petitioner above respondent No.2 in the seniority list.

2. The facts leading to filing of present Special Civil Application in nutshell are that the petitioner was originall appointed as a Junior Clerk on 22.8.1979 in the respondent Corporation and respondent No.2 was appointed on the post of Junior Clerk on 9.7.1979. Petitioner and respondent No.2 both were appointed on probation initially for a period of one year. By order dated 6.11.1980 on completion of the aforesaid period of one year of probation the

petitioner was continued on long term temporary basis. Similarly, respondent No.2 on completion of one year probation period as on 9.10.1980 also came to be continued on long-term temporary basis. It is the case on behalf of the petitioner that thereafter by order dated 19.12.1981 the petitioner as well as respondent No.2 were promoted to the post of Junior Assistant initially for a period of one year on temporary and adhoc basis. It appears that by order dated 5.7.1984 again the petitioner and respondent No.2 came to be further promoted to the post of Junior Assistant, Class-III. That thereafter the petitioner as well as respondent No.2 further came to be promoted to the post of Senior Assistant by order dated 25.10.1985/10.12.1985. It appears that a combined provisional seniority list came to be published on 1.6.1988 showing the position of the respective employees as on 1.1.1988 in which respondent No.2 was shown at Serial No.2, above the petitioner and petitioner was shown at Serial No.4 based on the date of appointment in the

department, i.e., 9.7.1979 and 22.8.1979 respectively. It appears that the petitioner submitted his objection to the provisional seniority list on 28.6.1988 and by communication dated 2.1.1990 the representation of the petitioner made against the provisional seniority list came to be rejected. Thereafter the petitioner again made a representation. However, at the time of publication of the final seniority list on 4.1.1990. The objection submitted by the petitioner was considered and the provisional seniority list came to be confirmed meaning thereby the respondent No.2 continued to remain at Serial No.2 and the petitioner was placed at Serial No. 4 after the respondent No.2. It appears that thereafter an appeal came to be filed by the petitioner which also came to be dismissed by communication dated 29.1.1992. It appears that thereafter a further provisional seniority list came to be published on 1.1.1995 and on 17.1.1996 and objections were invited in which again the respondent No.2 was placed at Sl. No.2 and the petitioner was placed at Sl. No.4.

It appears that again the petitioner submitted his objections as raised earlier and by communication dated 18.7.1996 the objections submitted by the petitioner were overruled and the final seniority list came to be published on 18.7.1996 placing the respondent No.2 at Serial No.2 above the petitioner who was placed at Serial No.4 considering the date of joining in the department of the petitioner and respondent No.2. Being aggrieved and dissatisfied with the said seniority list dated 18.7.1996 by which the respondent No.2 is placed at Serial No.2 and the petitioner at Serial No.4, the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India.

3. Shri P.P. Majmudar, learned advocate has vehemently submitted that when by order dated 6.11.1980 on completion of probation period of one year the petitioner was continued on long-term temporary basis the said date should be considered to be the date of confirmation of the petitioner in the department and when the

respondent No.2 completed his probation period of one year on 9.10.1980, i.e., after the petitioner and the respondent No.2 was continued on long-term temporary basis on 4.11.1980 the respondent No.2 should be considered as confirmed in the department on 9.10.1980, i.e., after the petitioner and therefore the respondent No.1 has committed an error in placing the respondent No.2 in the seniority list above the petitioner and placing the petitioner at Serial No.4 after the respondent No.2. Shri Majmudar, learned advocate has relied upon relevant recruitment Rules, more particularly Rule 21 relating to seniority. While relying upon two decisions of the Hon'ble Supreme Court, i.e., in the case of ***The State of Punjab Vs. Dharam Singh*** reported in ***AIR 1968 S.C. Page 1210;*** and in the case of ***Om Prakash Maurya Vs. U.P. Co-operative Sugar Factories Federation,*** reported in ***AIR 1986 S.C. Page 1844,*** Shri Majmudar has submitted that when on completion of period of probation of one year by the petitioner on 22.8.1980 and by the respondent No.2 on

9.10.1980, they are required to be treated as confirmed in the department on 22.8.1980 and 9.10.1980 respectively and therefore when he respondent No.2 is to be treated as confirmed in the department on 9.10.1980 as the respondent No.2 has completed probation period of one year on 9.10.1980 i.e., after the petitioner the respondents have committed error in placing respondent No.2 above the petitioner in the seniority list considering the date of joining in the department, which is absolutely illegal.

4.1. Considering the affidavit-in-reply on behalf of respondent No.1 Corporation which shows that neither the petitioner nor the respondent No.2 are made confirmed and/or no confirmation order has been passed till date it is submitted that when the petitioner is continued on long-term temporary basis in the year 1980 and when the petitioner came to be continued in service for a long term of 26 years the contention on behalf of the respondent No.1 that the petitioner

is not confirmed cannot be accepted. It is further submitted by him that apart from the question whether any formal order of confirmation was required to be passed by the respondent No.1 or not and/or when the petitioner was continued on long term temporary basis it can be presumed that the petitioner was continued in the department or not, even the conduct on the part of the respondent No.1 in giving promotion to the petitioner on the next three higher posts, i.e., Junior Assistant, Senior Assistant etc., presupposes that the petitioner is confirmed in the department. It is submitted that once the petitioner is promoted to the next higher post it is to be presumed that the petitioner is confirmed in the department otherwise the promotion could not have been issued by the respondent No.1. Therefore it is requested to allow the present Special Civil Application and set aside the seniority list published by the respondent No.1 dated 18.7.1996 by which the respondent No.2 is placed at Sl. No.2 and

petitioner is placed at Sl. No.4.

5. Mrs. Pahwa, learned advocate appearing on behalf of respondent No.1, while opposing the present Special Civil Application has submitted that as per the relevant rule, more particularly Rule 21, seniority list is to be prepared on the basis of confirmation of an employee in the service of the Corporation in a grade according to his date of confirmation in the grading but in the present case no order of confirmation has been passed by the respondent No.1 Corporation and the Corporation has rightly considered the date of joining in the department for the purpose of seniority and when the respondent No.2 was admittedly appointed prior to the petitioner the respondent No.2 is rightly placed at Sl. No.2 in the seniority list above the petitioner. It is therefore requested to dismiss the present Special Civil Application.

6. Heard the learned advocates appearing on

behalf of the parties. At the outset, it is to be noted that inspite of the fact that there is lapse of more than 26 years there is no order of confirmation passed by the respondent No.1 Corporation, and even it is the case on behalf of the respondent No.1 in the affidavit-in-reply that there is no order of confirmation passed by the respondent No.1 Corporation. It is required to be noted that the both the petitioner and the respondent No.2 were appointed on probation initially for a period of one year in the year 1979 and after completion of one year of probation by orders dated 6.11.1980 and 4.11.1980 petitioner as well as the respondent No.2 came to be continued on long term temporary basis. When a pointed question was asked to the learned advocate appearing on behalf of the respondent No.1 as to what the respondent No.1 means by long term temporary basis and that too for a period of 26 years, the learned advocate appearing on behalf of respondent No.1 has no answer. It is required to be noted that the probation period of

one year expired in the year 1980 and the petitioner as well as the respondent No.2 came to be continued on long term basis. It is the case on behalf of the respondent No.1 in the affidavit-in-reply that the petitioner as well as respondent No.2 have not been confirmed in the department. However it is required to be noted that by order dated 19.12.1981 the petitioner as well as respondent No.2 came to be promoted to the post of Junior Assistant initially for a period of one year on adhoc and temporary basis. Thereafter by order dated 25.7.1984 the petitioner as well as respondent No.2 came to be further promoted to the post of Senior Assistant. Thus, when the petitioner and respondent came to be further promoted twice on the next available higher post, the contention on behalf of respondent No.1 that petitioner as well as respondent No.2 are not confirmed cannot be accepted. By the conduct on the part of the respondent No.1 itself by implication it is to be held that the petitioner and respondent No.2 both

are confirmed in service. Now, therefore, the question which is required to be considered by this Court in the peculiar facts and circumstances is that when neither the petitioner nor the respondent No.2 was specifically confirmed in the department, what should be the date which should be considered for the purpose of seniority. In the present case, admittedly the petitioner was appointed and he entered the department on 22.8.1979 and the respondent No.2 joined the respondent No.1 Corporation on 6.7.1979. Thus, so far as the date of joining is concerned, the respondent No.2 joined the department prior to the petitioner. In view of the fact that there was no specific order of confirmation passed by the respondent No.1 and when the petitioner and respondent No.2 both were promoted to the next higher post on the same date and even further promoted to the post of Senior Assistant on the very same day, the further question which requires consideration of this Court is whether in the aforesaid facts and

circumstances the respondent No.1 was justified in considering the date of appointment for the purpose of seniority or not.

7. It is the contention on behalf of the petitioner that in the order of promotion dated 19.12.1981 when the petitioner was shown above the respondent No.2 the petitioner is required to be treated as senior than the respondent No.2. However, it is required to be noted that so far as subsequent promotion of the petitioner as well as respondent No.2 to the post of Senior Assistant is concerned, the name of respondent No.2 is placed above the petitioner and therefore in the facts and circumstances of the case placement of the petitioner as well as the respondent No.2 in the order of promotion will not have that much significance.

8. While perusing the judgment relied upon by the learned advocate appearing on behalf of the petitioner in the case of ***The State of Punjab [supra]*** and in the case of ***Om Prakash***

Maurya [supra], it is required to be noted that so far as recruitment rules applicable to the case are concerned, the maximum period of probation prescribed is 3 years and therefore on completion of 3 years it can be presumed that the petitioner as well as respondent No.2 are confirmed in the department. It is further required to be noted that after completion of one year without passing any order of confirmation and on completion of probation period of one year the petitioner as well as respondent No.2 came to be promoted to the next higher post within the period of 3 years. Therefore, the submission that after completion of maximum period of probation, the petitioner as well as respondent No.2 can be said to have been confirmed in the department is not required to be considered in the facts of the case and at the most it can be said that when the petitioner as well as respondent No.2 were promoted to the next higher post they can be presumed to have been confirmed in the department by necessary implication.

Under the circumstances,in absence of any order of confirmation by the department when the respondent No.1 has considered the date of appointment in the department for the purpose of seniority which is made applicable to all the employees of the respondent No.1 Corporation it cannot be said that there is any illegality committed by the respondent No.1.

9. There is one another reason for not granting any relief in favour of the petitioner. That initially a combined provisional seniority list was published by the respondent No.1 on 1.6.1988 showing the position as on 1.1.1988 in which the respondent No.2 was placed at Sl. No. 2 and the petitioner was placed at Sr. No. 4. After the objections submitted by the petitioner and on consideration of the same the respondent No.1 rejected the same and published a final seniority list on 4.1.1990 and placement of the petitioner as well as respondent No.2 at Sr. No. 4 and 2 respectively came to be confirmed. It is

pertinent to note at this stage that even thereafter the petitioner did submit the representation against the final seniority list dated 4.1.1990, however the said representation came to be rejected. Even the appeal preferred against the said seniority list came to be dismissed by order dated 29.1.1992. The final seniority list dated 4.1.1990 has become final and the petitioner had never challenged the same till the next seniority list was published in the year 1996 which was based upon the earlier seniority list dated 4.1.1990. At this stage, the learned advocate appearing for the petitioner has submitted that as against the order in appeal dated 29.1.1992 rejecting the appeal against the final seniority list dated 4.1.1990 the representation was pending and a hearing was to be given which has not been given subsequently. However, the fact remains that till 1996 when the second seniority list came to be published showing the position as at 1.1.1995, the seniority list dated 4.1.1990 was not challenged.

Under the circumstances also, it is not open for the petitioner to subsequently challenge the second seniority list dated 17.1.1996/18.7.1996 which is based upon the earlier final seniority list dated 4.1.1990. On this ground also the petitioner is not entitled to any relief.

10. For the reasons stated above, the petition fails. Rule is discharged. Interim relief stands vacated forthwith. No costs.

[M.R. Shah, J.]

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